

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3

4 ZOOM ELECTRIC, INC.,

No. C 11-1699 CW

5 Petitioner,

ORDER DENYING  
MOTION TO DISMISS  
(Docket No. 91)  
AND SETTING CASE  
MANAGEMENT  
SCHEDULE

6 v.

7 INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 595,  
8 and DOES 1-20,

9 Respondents.

10 /  
11 INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 595;  
12 ALAMEDA COUNTY ELECTRICAL  
INDUSTRY SERVICE CORPORATION;  
13 IBEW LOCAL 595 HEALTH & WELFARE  
TRUST FUND; IBEW LOCAL 595  
PENSION TRUST FUND; IBEW LOCAL  
595 MONEY PURCHASE PENSION TRUST  
FUND; IBEW LOCAL 595 VACATION  
FUND; IBEW LOCAL 595 APPRENTICE &  
16 TRAINING FUND; ELECTRICAL  
CONTRACTORS TRUST; CONTRACT  
17 ADMINISTRATION FUND; LABOR  
MANAGEMENT COOPERATION FUND;  
18 VICTOR UNO; and DON CAMPBELL,

19 Counter-Plaintiffs,

20 v.

21 ZOOM ELECTRIC, INC.; VEIKO HORAK;  
B-SIDE, INC.; and DOES ONE  
22 through TEN, inclusive,

23 Counter-Defendants.

24 /  
25 Counter-Defendant B-Side, Inc. moves to dismiss the second  
26 amended counter-complaint filed against it by Counter-claimant  
27 International Brotherhood of Electrical Workers, Local 595 (the  
28 Union), the employee benefit trust funds, Alameda County

1 Electrical Industry Service Corporation (EISC), the collection  
2 agent for the trust funds, and Victor Uno and Don Campbell,  
3 trustees for the trust funds and officers of EISC. The Union  
4 opposes the motion. The Court took B-Side's motion under  
5 submission on the papers. Having considered the papers filed by  
6 B-Side and the Union, the Court DENIES B-Side's motion.

7 BACKGROUND

8 The background of this matter is set forth in greater detail  
9 in the Court's Order of March 20, 2012. See Docket No. 82.

10 Petitioner Zoom Electric, Inc. (ZEI) initiated this action on  
11 April 6, 2011, seeking to vacate an arbitration award in which it  
12 was found liable for failing to hire workers on a fire alarm  
13 replacement project at Roosevelt Middle School in the Oakland  
14 Unified School District in compliance with the governing Project  
15 Labor Agreement (PLA) and for failing to make required  
16 contributions to the employee benefit trust funds.

17 On May 6, 2011, the Union brought a counter-complaint with a  
18 single cause of action, seeking to confirm and enforce the  
19 arbitration award against ZEI and its sole owner, Vieko Horak.

20 On October 20, 2011, the Court granted the Union's motion for  
21 leave to file a first amended counter-complaint, adding a second  
22 cause of action under the Employee Retirement Income Security Act  
23 (ERISA), 29 U.S.C. §§ 1132, 1145. In that claim, the Union  
24 alleged that ZEI and Horak failed to make benefit contributions  
25 for work performed under the PLA between January and March 2011.

26 On March 20, 2012, the Court granted the Union's motion to  
27 confirm and enforce the arbitration award against ZEI and Horak  
28 and denied ZEI's cross-motion to vacate the award. The Court also

1 denied ZEI and Horak's motion to dismiss the Union's ERISA cause  
2 of action and granted the Union's motion for summary judgment on  
3 that claim against ZEI and Horak. Finally, the Court granted the  
4 Union's motion for leave to file a second amended complaint,  
5 adding Counter-Defendant B-Side, Inc., which served as ZEI's  
6 general contractor on the Roosevelt Middle School project, and  
7 various Counter-Plaintiffs. The Court also directed  
8 Counter-Plaintiffs to file a verified calculation of the damages  
9 requested in the ERISA cause of action, specifically a calculation  
10 of the contributions that ZEI failed to make, liquidated damages  
11 and interest.

12 On March 27, 2012, the Union filed a verified calculation of  
13 damages on the second cause of action, showing ZEI's balance due  
14 on that date, including accrued interest, as \$3,581.41.

15 On May 2, 2012, Horak sent the Union a check for \$3,581.41.  
16 On the check, he specified that the payment was directed to his  
17 liability on the second cause of action.

18 On May 4, 2012, the Union returned the check, because the  
19 Trust Funds' policy is "that partial payment from delinquent  
20 contractors are applied to that contractor's oldest month  
21 delinquency first, and within that month to interest and  
22 liquidated damages before contributions." Thomas Decl. ¶ 6, Ex.  
23 2. Thus, the Union would only accept the check if it were applied  
24 to the balances due for October 2010 work, Horak's oldest  
25 delinquency.

26 DISCUSSION

27 B-Side moves to dismiss the first cause of action, arguing  
28 that the Court lacks subject matter jurisdiction over the claim

1 against it. It moves to dismiss the second cause of action on the  
2 grounds that there is no live controversy because, on May 2, 2012,  
3 Horak sent the Union a check for \$3,581.41.

4 I. First Cause of Action

5 B-Side argues that the federal claims have been adjudicated  
6 in this case and that the Court lacks supplemental jurisdiction to  
7 consider whether to hold it liable.

8 B-Side bases its arguments on the Court's statement in the  
9 March 20, 2012 Order, in which the Court addressed ZEI's  
10 contention that allowing the Union to amend its complaint to add  
11 B-Side would substantially increase litigation costs for ZEI. The  
12 Court rejected ZEI's argument, stating that "with this Order, the  
13 Court resolves all claims against ZEI, and only the liability of  
14 B-side remains to be adjudicated," and "[e]ven if additional  
15 discovery were required from ZEI, it would be very limited, and  
16 would only go to whether ZEI was the sub-contractor of B-side for  
17 the relevant jobs and whether ZEI was licensed during the relevant  
18 time period." Order of March 20, 2012, 30. This statement,  
19 addressing the potential burden of continued litigation on ZEI,  
20 does not support B-Side's characterization of the claim against it  
21 as arising only under state law.

22 The first counter-claim in this action is brought against all  
23 three Counter-Defendants, seeking to confirm and enforce the  
24 arbitration award under section 301 of the Labor-Management  
25 Relations Act, 29 U.S.C. § 185 and holding B-Side liable for that  
26 violation through California Labor Code section 2750.5. While the  
27 counter-claim has been fully adjudicated against ZEI and Horak,  
28 the latter by piercing the corporate veil, it has not been

1 adjudicated as to B-Side. The theory of the counter-claim against  
2 B-Side is that the arbitration award should be confirmed and  
3 enforced pursuant to federal law against ZEI and that B-Side  
4 should be held liable for the award pursuant to state law. This  
5 is not two distinct claims, as B-Side characterizes it. For B-  
6 Side to be found liable for anything, the underlying liability  
7 based on federal law must be found as well as the obligation  
8 imputing that liability to B-Side directly. The claim against B-  
9 Side thus arises under both state and federal law.

10 Even if the claim against B-Side was distinct from those  
11 against ZEI and Horak and arose under state law, the Court has  
12 supplemental jurisdiction over it and does not exercise its  
13 discretion to decline that jurisdiction.

14 In its reply, B-Side argues for the first time that the Court  
15 cannot exercise supplemental jurisdiction over a state-law claim  
16 when that claim brings a new party in the action. In doing so,  
17 B-Side relies heavily on the Ninth Circuit's decision in Ayala v.  
18 United States, 550 F.2d 1196 (9th Cir. 1979), and does not  
19 recognize the importance of Congress's enactment of 28 U.S.C.  
20 § 1367 in 1990.

21 "Prior to the passage of § 1367, supplemental jurisdiction  
22 was more circumscribed and the addition of a party was one factor  
23 that barred jurisdiction over additional claims brought by  
24 plaintiffs." Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1172  
25 (9th Cir. 2002). In 1979, the Ninth Circuit in Ayala "held that  
26 federal courts were without power to exercise pendent party  
27 jurisdiction under the Federal Tort Claims Act." Mendoza, 301  
28 F.3d at 1173 (discussing Ayala, 550 F.2d at 1199-1200). A decade

1 later, in Finley v. United States, 490 U.S. 545, 549 (1989), the  
2 Supreme Court "'assumed, without deciding,' that pendent party  
3 jurisdiction was constitutional, but cautioned that it requires an  
4 express statutory jurisdictional grant." Mendoza, 301 F.3d at  
5 1173. "In 1990, Congress enacted § 1367 to provide such an  
6 express grant." Id. (citing Pub. L. No. 101-650 § 310). See also  
7 28 U.S.C. § 1367(a) ("Such supplemental jurisdiction shall include  
8 claims that involve the joinder or intervention of additional  
9 parties."). Subsequently, in Mendoza, the Ninth Circuit  
10 recognized that "Ayala's restrictive interpretation does not  
11 survive the 1990 passage of § 1367." Id. at 1173-74 (observing  
12 that "any suggestion in Ayala that the Constitution imposes a bar  
13 on supplemental jurisdiction over additional parties independent  
14 of statutory authorization has been undermined by intervening  
15 Supreme Court authority," and thus that the prior panel decision  
16 in Ayala is no longer binding).

17 Given the clear text of § 1367 and the Ninth Circuit's  
18 decision in Mendoza, the Court rejects B-Side's argument that it  
19 cannot exercise supplemental jurisdiction over additional parties  
20 unless "an independent ground for federal jurisdiction" is shown.  
21 Reply, at 7-8.

22 Title 28 U.S.C § 1367 grants federal courts "supplemental  
23 jurisdiction over all other claims that are so related to claims  
24 in the action within such original jurisdiction that they form  
25 part of the same case or controversy under Article III of the  
26 United States Constitution." "A state law claim is part of the  
27 same case or controversy when it shares a 'common nucleus of  
28 operative fact' with the federal claims and the state and federal

1 claims would normally be tried together." Bahrampour v. Lampert,  
2 356 F.3d 969, 978 (9th Cir. 2004) (quoting Trs. of the Constr.  
3 Indus. & Laborers Health & Welfare Trust v. Desert Valley  
4 Landscape Maint., Inc., 333 F.3d 923, 925 (9th Cir. 2003)). Here,  
5 the claims against ZEI and Horak share a common nucleus of  
6 operative fact with the claims against B-Side; both arise out of  
7 the enforceability of the arbitration award. Further, the claims  
8 against Horak and B-side each involve the status of ZEI's license  
9 at the time of the construction project.

10 Although this Court has supplemental jurisdiction, it  
11 may decline to exercise supplemental jurisdiction over a  
12 claim under subsection (a) if--

13 (1) the claim raises a novel or complex issue of  
14 State law,

15 (2) the claim substantially predominates over the  
16 claim or claims over which the district court has  
17 original jurisdiction,

18 (3) the district court has dismissed all claims over  
19 which it has original jurisdiction, or

20 (4) in exceptional circumstances, there are other  
21 compelling reasons for declining jurisdiction.

22 28 U.S.C. § 1367(c). "[W]hile discretion to decline to exercise  
23 supplemental jurisdiction over state law claims is triggered by  
24 the presence of one of the conditions in § 1367, it is informed by  
25 the [United Mine Workers v. Gibbs, 383 U.S. 715 (1966),] values of  
26 'economy, convenience, fairness, and comity.'" Acri v. Varian  
27 Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997).

28 In its motion, B-Side argues that the Court should decline  
jurisdiction under § 1367(c)(3), because all federal claims have  
been dismissed. In its reply, it also contends that, since the  
federal claims have been resolved, the state claim predominates

1 because it is the only claim remaining to be adjudicated. B-Side  
2 does not argue that the state law issues here are novel or complex  
3 or that there are other exceptional circumstances warranting  
4 dismissal.

5 The Ninth Circuit has upheld a district court's exercise of  
6 its discretion to decline supplemental jurisdiction over remaining  
7 state claims after it resolved the federal claims on summary  
8 judgment. See Oliver v. Ralphs Grocery Co., 654 F.3d 903, 911  
9 (9th Cir. 2011) (citing Sanford v. Member Works, Inc., 625 F.3d  
10 550, 561 (9th Cir. 2010); Carnegie-Mellon Univ. v. Cohill, 484  
11 U.S. 343, 350 n.7 (1988)); Bryant v. Adventist Health System/West,  
12 289 F.3d 1162, 1169 (9th Cir. 2002) (citing Cohill, 484 U.S. at  
13 350 n.7). In those cases, however, the federal claims were  
14 resolved in favor of the defendants, who also sought dismissal of  
15 the state law claims. Further, rather than relying solely on the  
16 resolution of the federal claims, the Ninth Circuit also cited  
17 Cohill's factors of "judicial economy, convenience, fairness, and  
18 comity." Here, the B-Side shares counsel with ZEI and Horak, and  
19 the parties have already thoroughly litigated the enforceability  
20 of the arbitration agreement and have conducted discovery into the  
21 licensed status of ZEI. B-Side participated in the earlier motion  
22 practice, having submitted a declaration in support of ZEI and  
23 Horak's position. Additionally, the Court has already conducted  
24 substantial analysis of the applicability of California Labor Code  
25 section 2750.5, specifically of whether the LMRA preempts the  
26 section. Thus, judicial economy and convenience do not favor  
27 dismissal. Further, the fact that the summary judgment order  
28 resolved the claims against Horak and ZEI in the Union's favor

1 means that dismissal of the remaining claims would not promote a  
2 fair result; here, unlike in Oliver and Bryant, if those claims  
3 had gone to trial, they would have been adjudicated in favor of  
4 the Union. The fact that they were resolved in a more efficient  
5 manner prior to trial, and were found meritorious, does not mean  
6 that the Union is then barred from proceeding with its other  
7 claims. See also Parker v. Scrap Metal Processors, Inc., 468 F.3d  
8 733, 745 (11th Cir. 2006) (stating that that court could locate no  
9 authority in which state law claims were "dismissed against a  
10 party's preference after the federal claims had been tried and  
11 resolved in that party's favor"). Finally, the fact that the  
12 district courts in Oliver and Bryant did not abuse their  
13 discretion in declining supplemental jurisdiction over the state  
14 law claims in those cases does not mean that they necessarily  
15 would have abused their discretion by accepting jurisdiction.

16 Accordingly, the Court DENIES B-Side's motion to dismiss the  
17 first cause of action.

18 II. Second cause of action

19 B-Side moves to dismiss the second cause of action, arguing  
20 that the claim is moot, because on May 2, 2012, Horak sent the  
21 Union a check for \$3,581.41 in full satisfaction of the claimed  
22 damages for the failure to pay timely the benefits for January  
23 through March 2011.

24 The Court rejects this argument for a number of reasons.  
25 First, on its face, this check did not meet Horak's outstanding  
26 liability for his contributions made between January and March  
27 2011. The check's amount covered interest only through March 27,  
28

1 2012 when the Union filed its verified calculation. Interest  
2 continued to accrue, and Horak did not tender that amount.

3 Further, more importantly the check amounts to a settlement  
4 offer, which the Union rejected. B-Side does not reply to the  
5 Union's contention that Horak is bound by the Trust Funds'  
6 established allocation policy, applying the payment to his oldest  
7 indebtedness first. Further, Horak did not satisfy the full  
8 amount of relief sought: the Union also seeks costs and attorneys'  
9 fees to cover expenses incurred in this action. While B-Side  
10 cites cases in which courts have held that "an interest in  
11 attorney's fees is insufficient to create an Article III case or  
12 controversy where a case or controversy does not exist on the  
13 merits of the underlying claim," here, the settlement offer  
14 without attorneys' fees was rejected, not accepted, so the  
15 underlying claim was not resolved or mooted. B-Side cites cases  
16 in which a claim was rendered moot "by payment and satisfaction of  
17 a final judgment." Reply, at 1 (quoting U.S. Parole Commission v.  
18 Geraghty, 445 U.S. 388, 401 (1980)). However, here, there was no  
19 final judgment entered; thus, Horak did not satisfy any such final  
20 judgment. When a final judgment is entered, it may include costs  
21 and attorneys' fees.

22 Accordingly, the Court DENIES B-Side's motion to dismiss the  
23 second cause of action.

24 CONCLUSION

25 For the reasons set forth above, the Court DENIES B-Side's  
26 motion to dismiss (Docket No. 91).

27

28

1 Having considered the parties' separate case management  
 2 statements, the Court sets forth the following case management  
 3 schedule:

4 <u>Event</u>	5 <u>Date</u>
6 Completion of fact discovery	7 Thursday, August 30, 2012
7 Deadline for Counter-Plaintiffs to file their 8 motion for summary judgment, in a brief of 25 pages or less.	8 Thursday, September 13, 2012
9 Deadline for B-Side to file its opposition to 10 Counter-Plaintiffs' motion and its cross- motion for summary judgment, if any, in a single brief of twenty-five pages or less.	9 Thursday, September 27, 2012
11 Deadline for Counter-Plaintiffs to file their 12 reply in support of their motion for summary judgment and their opposition to B-Side's 13 cross-motion for summary judgment, in a single brief of fifteen pages or less.	11 Thursday, October 4, 2012
14 Deadline for B-Side to file its reply in 15 support of its cross-motion for summary judgment, in a brief of fifteen pages or less.	14 Thursday, October 11, 2012
16 Deadline for the parties to file a joint case 17 management conference statement.	16 Thursday, October 18, 2012
18 Hearing on motions for summary judgment, and 19 further case management conference.	18 Thursday, October 25, 2012 at 2:00 p.m.
20 Final pretrial conference	20 Wednesday, January 23, 2012 at 2:00 p.m.
21 One-day bench trial	21 Monday, February 4, 2012 at 8:30 a.m.

23 The Court will entertain a stipulation to change the case  
 24 management schedule, provided that opposing briefs are filed in  
 25 series as described above, not contemporaneously, that the  
 26 parties' briefing is completed at least two weeks prior to the  
 27 hearing date, and that the hearing on the motions for summary  
 28

1 judgment takes place at least three months before the start of  
2 trial.

3 IT IS SO ORDERED.

4  
5 Dated: 6/27/2012  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

  
CLAUDIA WILKEN  
United States District Judge